

STATE OF MICHIGAN
COURT OF APPEALS

LAKESHORE, P.L.C., EDWARD NEBEL, M.D.,
FRANK BRETTSCHEIDER, D.O., JAMES
COPING, M.D., KRISHNA VALGEE, M.D. AND
GERALD JERRY, M.D.,

UNPUBLISHED
January 15, 1999

Plaintiffs-Appellants,

v

DEPARTMENT OF COMMUNITY HEALTH and
CERTIFICATE OF NEED COMMISSION,

No. 201333
St. Clair Circuit Court
LC No. 96-002291 AZ

Defendants-Appellees.

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court's order which granted defendants' motion for summary disposition, on the ground that the court lacked subject-matter jurisdiction. Plaintiffs, who had applied to the Department of Community Health (DCH) for a Certificate of Need (CON) under MCL 333.22223-22225; MSA 14.15(22223)-(22225) in order to construct a surgical facility, but who had not yet received a decision on the application, filed a complaint in circuit court and argued that the revised CON review standards adopted on January 27, 1996 were arbitrary and unconstitutional. The trial court ruled that it had no jurisdiction over plaintiffs' claims because plaintiffs had failed to exhaust their administrative remedies by obtaining a determination from DCH regarding their application for CON as required by MCL 333.22231; MSA 14.15(22231), MCL 333.22232; MSA 14.15(22232), and MCL 24.271 *et seq.*; MSA 3.560(171) *et seq.* We agree and therefore affirm.

Whether a circuit court has subject-matter jurisdiction is a question of law that we review de novo. *W.A. Foote Memorial Hospital v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995).

Plaintiffs argue that MCL 333.22231(9); MSA 14.15(22231)(9), which mandates that final CON decisions be appealed only on the record to the circuit court, was inapplicable to their claims because they involved constitutional issues for which no useful record could have been developed by the DCH. We disagree. In *Foote, supra* at 521, the plaintiffs, like plaintiffs here, filed an action for declaratory and injunctive relief regarding allegedly improperly-adopted CON review standards before a decision on their CON application had been reached. We held that the circuit court had no subject-matter jurisdiction over the action because proper procedures, i.e., receiving a final decision from the agency and appealing from that decision, had not been followed. We stated:

... the trial court erred in assuming jurisdiction over this dispute. Under part 222 of the code, the Legislature specified that aggrieved parties may challenge defendant's decision to issue or deny CONs in the circuit court only after exhausting their administrative remedies, in accordance with MCL 333.22231; MSA 14.15(22231) and MCL 333.22232; MSA 14.15(22232) as well as MCL 24.271 *et seq.*; MSA 3.560(171) *et seq.* [*Id.* at 522, citing *Pontiac Osteopathic Hosp v Dep't of Public Health*, 157 Mich App 583, 586; 403 NW2d 82 (1986).]

Here, as in *Foote*, plaintiffs were required to receive a final decision from the DCH and otherwise exhaust their administrative remedies before seeking redress in the circuit court.

II

Plaintiffs also contend that even if the exhaustion requirements would generally apply to their arguments, they do not apply here because further proceedings with the DCH would have been futile. Like plaintiffs in *Foote*, plaintiffs here argue that further administrative proceedings would have been futile in this case because they raised constitutional issues that an administrative board would be powerless to resolve. We disagree. Plaintiffs' arguments regarding the revised review standards were *not* of a constitutional nature, since plaintiffs had no vested, constitutionally-protected property or liberty interests at stake. As we indicated in *Foote, supra* at 524:

[P]laintiffs have no vested property or liberty right at stake, so due process challenges are unfounded and there exists no true constitutional issue. . . . We find no support for the trial court's conclusion that plaintiffs had a vested right to have their CON applications reviewed under the old CON review standards. A right cannot be vested unless it is more than an abstract need, desire, or unilateral expectation of the right Rather, plaintiffs must establish a legitimate claim of entitlement to it Here, plaintiffs had nothing more than a mere expectation that their CON applications would be evaluated under the old CON review standards. [Emphasis added.]

Had some of plaintiffs' arguments been constitutional, the exhaustion requirements would nonetheless apply, because there is also a fundamental, non-constitutional issue to be resolved by the DCH, specifically, whether plaintiffs' CON application would be accepted or denied. As stated in *Michigan Supervisors Union OPIEU Local 512 v Dep't of Civil Service*, 209 Mich App 573; 531 NW2d 790 (1995),

. . . the exhaustion requirement is displaced only when there are no issues in controversy other than the constitutional challenge. The mere presence of a constitutional issue is not the decisive factor in avoiding the exhaustion requirement. If there are factual issues for the agency to resolve, the presence of a constitutional issue, or the presence of an argument couched in constitutional terms, does not excuse the exhaustion requirement even if the administrative agency would not be able to provide all the relief requested.

Here, there are numerous factual issues that should be resolved before a final decision on plaintiffs' CON application could be reached. Therefore, efforts on plaintiffs' part to exhaust their administrative remedies before appealing to the circuit court would not have been futile.

III

Finally, plaintiffs claim that because the chief member of the CON review board sent them a letter indicating that the revised review standards would apply to their CON application, the DCH evidenced a predisposition to rule against them, such that exhaustion proceedings should not have been required. We disagree. This letter does not speak to the fundamental issue involved – whether plaintiffs' CON application would be accepted or denied. Until this issue has been administratively resolved, plaintiffs have not exhausted their administrative remedies.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Hilda R. Gage